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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1994

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CHARLES BELLA,
*Petitioner,*

v.

LEE CHAMBERLAIN and CURTIS MEYERS,
*Respondents.*

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**Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit**

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## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Whether police conduct actionable under the Fourth Amendment in a civil action for damages encompasses only conduct occurring at the moment of seizure, as defined by *California v. Hodari D.*, 499 U.S. 621 (1991), or all police conduct applied to effect an arrest, investigatory stop or other seizure of a free citizen as defined by *Graham v. Connor*, 490 U.S. 386 (1989)?

2. Whether the intentional use of deadly force against an innocent hostage states a civil rights claim against a federal police officer under the Fifth Amendment?

3. Whether this Court's qualified immunity jurisprudence, as applied in Fourth and Fifth Amendment cases, must be clarified to require a factual record as a predicate to the determination of the excessiveness of force?

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CHARLES BELLA,

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**Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit**

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## PETITION FOR A WRIT OF CERTIORARI

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The petitioner, Charles Bella, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit, entered in the above-entitled proceedings on May 20, 1994.

### OPINIONS BELOW

The opinion of the Court of Appeals for the Tenth Circuit is reported at 24 F.3d 1251, and is reprinted in the appendix at 1a-16a, *infra*.

The memorandum opinion and order of the United States District Court for the District of New Mexico (Mechem, D.J.), has not been reported. It is reprinted in the appendix at 17a-24a, *infra*.

### JURISDICTION

Invoking federal jurisdiction under 28 U.S.C. § 1331, the petitioner brought this suit in the United States District Court for the District of New Mexico, against two

officers of the United States Customs Service, seeking damages directly under the United States Constitution. *See Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971). On February 25, 1993, the district court denied the respondents' motion to dismiss, which claimed that the defendants had qualified immunity because the complaint failed to state a constitutional claim. *See* Appendix at 17a-24a, *infra*.

Respondents brought an immediate appeal pursuant to *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985) ("denial of a claim of qualified immunity, to the extent that it turns on an issue of law, is an appealable 'final decision' within the meaning of 28 U.S.C. § 1291 notwithstanding the absence of a final judgment"). On May 20, 1994, the Tenth Circuit entered a judgment and an opinion reversing the district court's order, and directing that petitioner's complaint be dismissed for failure to state a constitutional claim. *See* Appendix at 1a-16a, *infra*. No petition for rehearing was sought.

On August 8, 1994, Justice Ginsburg ordered that the time for filing this petition for writ of certiorari be extended to and including September 17, 1994.

The jurisdiction of this Court to review the judgment of the Tenth Circuit is invoked under 28 U.S.C. § 1254 (1).

## CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const., Amend. IV provides in pertinent part:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated . . . .

U.S. Const., Amend. V provides in pertinent part:

> [N]or shall any person . . . be deprived of life, liberty, or property, without due process of law . . .

## STATEMENT OF THE CASE

On July 11, 1988, while piloting his Gazelle helicopter on a charter flight near Santa Fe, New Mexico, petitioner Charles Bella was hijacked. He was ordered at gunpoint to land in the New Mexico Penitentiary prison yard where the helicopter was boarded by three inmates. Mr. Bella was handcuffed to the controls of his helicopter and was ordered by his captors to fly south toward Albuquerque. Mr. Bella was ordered to land at an airport in Los Lunas, New Mexico, where the inmates disembarked, leaving Mr. Bella handcuffed to the helicopter. Respondent Chamberlain landed his United States Customs Service Blackhawk helicopter in front of the Gazelle. Another special agent, respondent Meyers, left the Blackhawk and approached the Gazelle. He saw one of the inmates return to the Gazelle, put a gun to Mr. Bella's head, and order him to take off again. Both Meyers and Chamberlain could see that Mr. Bella was being used as a shield, and they knew or should have known that Mr. Bella was an innocent hostage.

As Mr. Bella attempted to pilot the Gazelle away from Los Lunas while in handcuffs with a gun to his head, respondent Chamberlain hovered the Blackhawk within twenty to fifty feet of the Gazelle. Respondent Meyers, also aboard the Blackhawk, fired three rounds from a semi-automatic weapon at the Gazelle, one of which hit the Gazelle. Respondents then pursued the Gazelle during its brief flight to Albuquerque, as Mr. Bella, following the orders of his armed captor, landed first at Coronado Airport, and then flew to Albuquerque International Airport. A New Mexico State Police helicopter joined the chase at Coronado. While in flight, the respondents' helicopter and the state police helicopter boxed in the Gazelle, and again flew dangerously close to the Gazelle, forcing Mr. Bella to maneuver so as to avoid a deadly collision. These actions caused damage to the Gazelle helicopter and threatened Mr. Bella's life and safety. When the Gazelle

ultimately landed at Albuquerque International Airport, Mr. Bella and the remaining inmate captor were taken into police custody. Mr. Bella suffered no physical injury throughout the encounter, although he did suffer serious emotional trauma and substantial damage to his helicopter.

Mr. Bella's complaint, filed against the respondents on July 11, 1991, claims a violation of his Fourth Amendment right to be free from unreasonable searches and seizures, and his Fifth Amendment right to be free from the deprivations of liberty and property without due process of law. Respondents moved to dismiss the complaint, asserting that they were entitled to qualified immunity under the doctrine of *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), because the complaint failed to state a constitutional claim.

On February 25, 1993, the district court issued its Memorandum Opinion and Order denying respondents' motion. With respect to the Fourth Amendment claim, the district court rejected respondents' attempt "to separate the officers' behavior during pursuit from the arrest which occurred at the end of the pursuit," and distinguished the case from *California v. Hodari D.*, 499 U.S. 621 (1991). *See* Appendix at 19a, *infra*. The district court applied the test of *Brower v. County of Inyo*, 489 U.S. 593, 599 (1989) ("it is enough for a seizure that a person be stopped by the very instrumentality set in motion or put in place in order to achieve that result") to reach its conclusion that petitioner had stated a Fourth Amendment claim. According to the district court, it was sufficient to state a claim that the respondents' actions "were alleged to have been deliberately taken by enforcement officers during a high-speed, aerial chase for the purpose of effecting the seizure of the Gazelle's occupants," thus contributing "to plaintiff's eventual seizure." Appendix at 20a, *infra*.

With respect to Mr. Bella's Fifth Amendment claim, the district court rejected respondents' contention that there can be no due process violation absent some physical injury, concluding that the use of deadly force against a hostage is sufficient to state a Fifth Amendment due process claim. Appendix at 21a, *infra.* Thus, the trial court denied respondents' Fed. R. Civ. P. 12(b)(6) motion to dismiss.[1]

The Tenth Circuit concluded that Mr. Bella had failed to state a constitutional claim under either the Fourth or Fifth Amendment. Appendix at 16a, *infra.* With respect to the Fourth Amendment claim, the Tenth Circuit refused to apply this Court's holdings in *Graham v. Connor,* 490 U.S. 386 (1989) and *Brower v. County of Inyo,* 489 U.S. 593 (1989). Instead, the Tenth Circuit applied the narrow definition of seizure contained in *California v. Hodari D.,* 499 U.S. 621 (1991), and concluded that since the conduct complained of preceded the effectuation of a "seizure" there could be no Fourth Amendment violation.

With respect to the Fifth Amendment claim, the Tenth Circuit rejected the trial court's conclusion that the use of potentially deadly force against an innocent hostage is sufficient to state a Fifth Amendment due process claim. Instead, the Tenth Circuit focused on the lack of physical injury, and went on to weigh the facts as alleged in the complaint to conclude that "the potentially deadly force" used in this case was not " 'grossly disproportionate' to the need presented," and therefore did not state a Fifth Amendment due process claim. Appendix at 14a, *infra.*

Based on the foregoing, the Tenth Circuit reversed the order of the district court, and remanded with instructions to dismiss the complaint. *Id.* at 16a.

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[1] The trial court also rejected respondents' claim of qualified immunity, concluding that Mr. Bella's case involved constitutional rights which were clearly established at the time, and of which the respondents either knew or should have known. Appendix at 22a-24a, *infra.*

## REASONS FOR GRANTING THE WRIT

### I. The Tenth Circuit's Reliance on the Narrow "Seizure" Standard of *California v. Hodari D.*, 499 U.S. 621 (1991) to Deny Petitioner's Fourth Amendment Claim Conflicts With This Court's Opinion in *Graham v. Connor*, 490 U.S. 386 (1989) and Presents an Important Question of Federal Law Which Has Not Been, But Should Be, Settled by This Court Because It Is Confounding the Lower Courts and Has Led to Serious Conflicts Among the Circuits.

This case poses the fundamental question of whether all conduct in the course of a police encounter which culminates in a seizure is scrutinized under the Fourth Amendment in a civil action for damages. Restricting the Fourth Amendment inquiry to the precise moment of seizure, as the Tenth Circuit did, precludes from judicial redress under the Fourth Amendment wholly unreasonable police actions which ultimately, if not immediately, result in an injurious seizure of a free citizen. It precludes from Fourth Amendment review excessive force applied before seizure, after seizure, or in the course of a failed seizure, no matter how unreasonable or abusive the police conduct may be. This question therefore bears on the continuing vitality of the Fourth Amendment as a source of individual rights enforceable in a civil action for damages.

One might have thought that this question had been resolved several terms ago when this Court decided *Brower v. County of Inyo*, 489 U.S. 593 (1989) and *Graham v. Connor*, 490 U.S. 386 (1989). In *Brower*, this Court permitted Fourth Amendment scrutiny of police conduct in assembling a "deadman roadblock" to catch a fleeing suspect, even though the assembly of the roadblock preceded the eventual "moment of seizure" when the suspect actually ran into the roadblock. *See*, 489 U.S. at 597-99. *Brower* thus established that Fourth Amendment scrutiny encompasses police conduct intentionally applied to effect the seizure. *Id.* at 599.

*Graham* involved claims of excessive force against several police officers arising from an investigatory stop and detention during which Mr. Graham was held under varying degrees of police restraint. *See,* 490 U.S. at 389-91. This Court concluded that the Fourth Amendment provided "an explicit textual source of constitutional protection against this sort of physically intrusive governmental conduct." *Id.* at 396. The Court held that *"all* claims that law enforcement officers have used excessive force—deadly or not—in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard," *id.* at 395, n. 10, without reference to the specific moment in time when the seizure took place. If *Graham* and *Brower* control here, then the district court properly concluded that the actions here "alleged to have been deliberately taken by enforcement officers during a high-speed, aerial chase for the purpose of effecting the seizure" were sufficient to state a Fourth Amendment claim for violation of petitioner's "right to be free from unreasonable seizure." Appendix at 20a, *infra.*

The difficulty arises, however, from this Court's later decision in *California v. Hodari D.,* 499 U.S. 621 (1991). *Hodari* involved a much different question concerning whether, in the context of a criminal prosecution, inculpatory evidence revealed after the pursuit of the subject had begun, but before he succumbed to a physical seizure, was lawfully gained evidence. The *Hodari* Court concluded that for suppression purposes under the exclusionary rule "[a] seizure is a single act, and not a continuous fact," *id.* at 625 (quoting *Thompson v. Whitman,* 18 Wall. 457, 471 (1874)), and that a seizure only occurs when a fleeing person is physically touched by police or submits to the officer's show of authority. *Id.* at 626.

The district court refused to apply *Hodari* to civil liability claims alleging that excessive force was used in the

process of effectuating an arrest, investigatory stop or other seizure. Appendix at 19a, *infra*. The Tenth Circuit, however, found that *Hodari* restricted the scope of Fourth Amendment inquiry in civil liability cases to force applied only at the moment of seizure. "[W]e scrutinize only the seizure itself, not the events leading to the seizure, for reasonableness under the Fourth Amendment." *Id.* at 10a, *infra*. Thus, the Tenth Circuit rejected Mr. Bella's contentions that the harm to his helicopter and the danger to his safety occurred in the course of his arrest. *Id.*[2] Thus, this case squarely presents the question whether *Graham* or *Hodari* should apply in determining whether a complaint states a Fourth Amendment excessive force claim. This important question cries out for final resolution by this Court, because it is confounding the lower courts, and has led to a serious conflict among the circuits.

Relying on *Hodari*, at least three circuit courts, including the Tenth Circuit in this case, have embarked upon the task of dissecting the chain of events leading up to a seizure to distinguish "pre-seizure" conduct precluded from Fourth Amendment scrutiny from seizure-related conduct which is actionable under the Fourth Amendment. In the process, the circuit courts have produced drastically

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[2] The circuit court also decided that the shot which struck and damaged Mr. Bella's helicopter did not constitute physical force as applied to him. Appendix at 11a, n.8, *infra; but see Keller v. Frink*, 745 F. Supp. 1428, 1432 (S.D. Ind. 1990) (firing a weapon at an occupied vehicle constitutes deadly force toward its occupants).

Petitioner contends that while the moment in time standard in *Hodari* may be necessary in the exclusionary rule context, it makes no sense in the context of a civil claim for damages based on excessive force. The exclusionary rule determination focuses on a discrete moment in time and space, whereas the excessive force question focuses on the reasonableness of the entire police process which effectuates the seizure. In the latter instance it makes no sense, as the district court here recognized, "to separate the officers' behavior during pursuit from the arrest that occurred at the end of the pursuit." Appendix at 19a, *infra*.

conflicting interpretations on the scope of police conduct actionable under the Fourth Amendment.

The Tenth Circuit in this case indicates that only events "immediately connected with the actual seizure" will state a Fourth Amendment claim, but provides little guidance as to which events will be regarded as "immediately" effecting seizure and which will not. Appendix, at 10a, n.7.[3] The Seventh Circuit has rejected as "pre-seizure" conduct the actions of a group of police officers in surrounding the car of a suspect they had reason to believe was heavily armed. *See, Carter v. Buscher,* 973 F.2d 1328 (7th Cir. 1992). That court permitted Fourth Amendment scrutiny only of the officers' final acts in shooting the suspect in the shooting which ensued. *Id.* at 1333; *but see, McDonald v. Haskins,* 966 F.2d 292 (7th Cir. 1992) (Fourth Amendment cause of action stated where officer held a gun to a child's head and threatened to pull the trigger even though no physical contact or arrest ensued).

The Eighth Circuit has gone so far in applying *Hodari* in a civil context as to distinguish between shots fired at a fleeing truck in the last instants prior to seizure, finding

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[3] Even within the Tenth Circuit, there are conflicting authorities on what police conduct is properly scrutinized under the Fourth Amendment standard of objective reasonableness. In the instant case, the Tenth Circuit found that Mr. Bella pled only "pre-seizure" conduct when he complained of force applied by federal officers to stop the helicopter in which he was being held hostage. Appendix at 9a-10a, *infra.* In *Quezada v. County of Bernalillo,* 944 F.2d 710 (10th Cir. 1991), however, the Tenth Circuit upheld a finding that a police officer violated the Fourth Amendment when his unreasonable tactics prior to the seizure ultimately necessitated the use of deadly force against the suspect. Moreover, in *Austin v. Hamilton,* 945 F.2d 1155, 1160 (10th Cir. 1991), the Tenth Circuit permitted Fourth Amendment scrutiny of force applied during a prolonged warrantless detention hours after the plaintiffs' arrests. Thus, even within the Tenth Circuit, there exists the fundamental conflict between *Hodari* and *Graham* which the petitioner asks this Court to address.

that only the officer whose bullet hit the suspect (and his supervisors) could be sued under the Fourth Amendment. *Cole v. Bone*, 993 F.2d 1328, 1333 (8th Cir. 1993). That court concluded that plaintiffs had failed to state any constitutional claim against the officers whose shots failed to accomplish a *Hodari* seizure. *Id.* at 1333. The Eighth Circuit also restricted the "totality of the circumstances" test crafted in *Tennessee v. Garner*, 471 U.S. 1, 8-9 (1985) and *Graham, supra*, at 396, to only those circumstances confronting the 'seizing' officer as he fired the 'seizing' shot. *See* 993 F.2d at 1333-34.[4]

Other circuit and district courts, like the district court in the instant case, have more faithfully followed *Graham*.

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[4] Taken to its logical extreme, this kind of mechanistic view of the instrumentality effecting seizure would impose an absurd and unworkable standard. For example, where seizure is accomplished by a group of officers all landing blows upon the suspect, the jury would be obliged to apply a substantive due process standard to the "pre-seizure" blows, a Fourth Amendment standard to the singular blow found to be the "seizing blow" and, presumably, a pretrial detainee standard to any subsequent blows. *See e.g., Graham, supra* at 396, n.10 (declining to decide at what point in the custodial continuum arrest ends and pretrial detention begins). Such an approach would completely undermine the broad "totality of the circumstances" standard crafted in *Tennessee* and *Graham*.

Restricting Fourth Amendment scrutiny to the "moment of seizure" also forces the lower courts to make dispositive factual findings about when and how seizure occurred, often very early in litigation. *See* Appendix at 4a, *infra* (motion to dismiss); *Carter v. Buscher, supra* (motion for summary judgment); *Cole v. Bone, supra* (motion for summary judgment); *but see Posr v. Doherty, et al.*, 944 F.2d 91, 99 (2nd Cir. 1991) (issue of precisely when seizure occurred is a question of fact) (citing *Sibron v. New York*, 392 U.S. 40, 67 (1968)). Rather than applying a broad standard to test the sufficiency of plaintiff's complaint, the lower courts are increasingly obliged on pretrial or even pre-discovery qualified immunity motions to make exacting findings about the sequence of events in a seizure, about the timing of those events and about their causal relation to the seizure, deciding the quintessential jury questions of reasonableness and causation at a stage in the litigation when the facts themselves may be poorly understood and not of record. *See* Point III, *infra*.

These courts continue to permit a broad inquiry into the facts and circumstances surrounding a seizure. *See, e.g., Alexander v. City and County of San Francisco,* —— F.3d ——, 1994 WL 321757 n. 10 (9th Cir. 1994) (plaintiff stated a "classic" Fourth Amendment excessive force claim when she alleged that deadly force applied against an armed, mentally ill, elderly, half-blind recluse was prompted by the officers' objectively unreasonable conduct in storming the home when they knew the man had threatened to shoot anyone who entered); *Mouille v. City of Live Oak, Texas,* 977 F.2d 924 (5th Cir. 1992), *cert. denied,* 113 S.Ct. 2443 (1993) (plaintiff who was injured in the course of the arrest of his business partner's son stated a Fourth Amendment claim); *Yates v. City of Cleveland,* 941 F.2d 444, 447 (6th Cir. 1991) (motion for qualified immunity denied where officer's "actions preceding the shooting were not those of an objectively reasonable police officer" and prompted the violent seizure); *Strachan v. City of Federal Heights, Colo.,* 837 F. Supp. 1086 (D. Colo. 1993) (summary judgment denied as to the non-shooting officers where there were genuine issues of material fact as to whether their participation in the operation was objectively unreasonable and proximately caused the deprivation of Mr. Strachan's constitutional rights).

Thus, conflicting decisions about the applicability of *Hodari* to civil liability cases and about the scope of Fourth Amendment claims in the excessive force context are proliferating, and the question poses a serious difficulty for the lower courts. The question is important and addresses the very vitality of the Fourth Amendment as a source of enforceable constitutional rights. There is little prospect for resolution of this far-reaching conflict without guidance from this Court. The need for guidance at this juncture is acute.

**II. The Tenth Circuit's Failure to Acknowledge That the Intentional Use of Deadly Force Against an Innocent Hostage States a Claim Against Federal Police Officers Under the Fifth Amendment, Is In Conflict With the Decisions of Other Federal Courts of Appeals On the Same Matter, and Presents an Important Question of Federal Law Which Has Not Been, But Should Be, Settled by This Court.**

The district court in this case also rejected respondents' contention that there can be no due process violation absent some physical injury, and concluded that petitioner's allegations that the officers directed potentially deadly force against an alleged hostage, "was sufficient to state a substantive due process claim under the Fifth Amendment." Appendix at 22a, *infra*. The Tenth Circuit rejected the trial court's conclusion that the use of deadly force against a hostage is sufficient to state a Fifth Amendment due process claim. Appendix at 15a, *infra*. Instead, the Tenth Circuit concluded that this complaint failed to state a Fifth Amendment claim because it did not allege any physical injury to the plaintiff, *id.* at 12a-13a,[5] and also because, after weighing the facts as alleged in the complaint, it determined that "the potentially deadly force" used in this case was not "grossly disproportionate to the need presented." *Id.* at 14a. Both of these rulings by the Tenth Circuit are in conflict with the settled law in other circuits, and this court should accept certiorari to resolve the conflict.

First, as recognized by the Tenth Circuit, *see, id.* at 12a-13a, other circuits have held that the lack of physical injury does not defeat an otherwise valid due process claim of excessive force. *See, e.g., Conner v. Sticher*, 801 F.2d 1266 (11th Cir. 1986); *Checki v. Webb*, 785 F.2d

[5] Although the Tenth Circuit declared that it "need not decide" the propriety of allowing a due process claim to proceed in the absence of an allegation of physical injury, Appendix at 13a, *infra*, much of its rationale and its conclusion are based on the lack of physical injury in this case. *See id.* at 12a-15a.

534 (5th Cir. 1986); *Black v. Stephens*, 662 F.2d 181 (3rd Cir. 1981), *cert. denied*, 455 U.S. 1008 (1982) (upholding jury verdict based on police brandishing a weapon and threatening to shoot); *White v. Rochford*, 592 F.2d 381 (7th Cir. 1979); *but see, Jackson v. Culbertson*, 984 F.2d 699 (5th Cir. 1993) (some minimal physical injury required in prisoner Eighth and Fourteenth Amendment excessive force case).

Second, the Tenth Circuit's holding that the allegations setting forth the intentional use of deadly force against an innocent hostage failed to state a claim is in conflict with the clear law of other circuits.[6] Indeed, the cases cited by the Tenth Circuit establish that conflict. In *Fernandez v. Leonard*, 784 F.2d 1209 (1st Cir. 1986), the First Circuit reversed the grant of summary judgment on the issue of qualified immunity where police officers allegedly shot an innocent hostage. That court held that the intentional use of deadly force against an innocent hostage without reason or provocation was conduct that shocks the conscience and violated a clearly established right. *Id.* at 1216. *See also Gutierrez-Rodriguez v.*

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[6] The legal standard which such claims must meet is currently an issue on which the courts are also sharply divided. This issue is discussed at length in the *en banc* Third Circuit opinion of *Fagan v. City of Vineland*, 22 F.3d 1296 (3rd Cir. 1994). There the majority held that the "shocks the conscience" standard is the appropriate standard in evaluating a police chase under the due process clause. However, the dissent catalogued the list of circuits which apply a recklessness standard and criticized the majority's analysis of the question.

The plaintiff argued here that he had met the "shocks the conscience" standard and the Tenth Circuit applied that standard here. Appendix at 12a, *infra*. However, in *Medina v. City of County of Denver*, 960 F.2d 1493, 1496 (10th Cir. 1992), the Tenth Circuit appeared to adopt the recklessness standard, concluding that "[p]ractically every court that has considered the issue has concluded that reckless intent may violate section 1983." Thus, the confusion on this most basic question exists within the Tenth Circuit, as well as among the circuits and merits the consideration of this Court if the writ issues in this case.

*Cartagena*, 882 F.2d 553 (1st Cir. 1989) (use of deadly force against persons the police should have known might be innocent, was sufficient to find liability under the due process clause).[7]

Similarly, in *Grandstaff v. City of Borger, Texas*, 767 F.2d 161 (5th Cir. 1985), *cert. denied*, 480 U.S. 916 (1987), the Fifth Circuit upheld a jury verdict finding that the use of deadly force against an innocent person was a violation of the due process clause. There the court held that the defendants could have been found reckless where they should have known they could be endangering an innocent person by their actions. *Id.* at 167-68.

Each of the above cases was based upon a record amassed through trial or extensive discovery and the only case involving a pre-trial motion was a reversal of summary judgment. *See, Fernandez, supra.* Thus these cases stand for the proposition that police use of deadly force against an innocent hostage must at least state a claim under the due process clause. *See also Medeiros v. Town of South Kingstown*, 821 F. Supp. 823 (D.R.I. 1993) (innocent passenger of the car stated a claim under the due process clause where he alleged that a high speed chase endangered him). Indeed, petitioner can find no case other than the instant Tenth Circuit case where a

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[7] Even the case of *Landol-Rivera v. Cruz Cosme*, 906 F.2d 791 (1st Cir. 1990), upon which the Tenth Circuit relies, conflicts with the Tenth Circuit approach. There the officers shot at a vehicle containing both the suspect and a hostage. The court found that the plaintiff was not entitled to affirmance of a jury verdict on due process grounds because it held that the officer who knew of the presence of the innocent hostage had only shot at the vehicle's tires. The officer who shot at the more deadly area of the door of the car believed both persons to be suspects. *Id.* at 797. The First Circuit's opinion is clearly based upon the facts developed at trial and notes that the lower court had earlier denied a defense motion for summary judgment. *Id.* at 794. Thus, *Landol-Rivera* properly allowed the plaintiff to proceed to trial on the allegations that the police shot at him as an innocent hostage in a car.

court has held that allegations stating that police officers used deadly force against an innocent hostage failed to state a claim under the due process clause.

**III. The Tenth Circuit's Improper Weighing of the Evidence Alleged in the Complaint to Determine That "The Potentially Deadly Force" Used In This Case Was Not "Grossly Disproportionate to the Need Presented," Is in Conflict With Decisions of Other Federal Courts of Appeals on the Same Subject, and Demonstrates Why This Court's Qualified Immunity Jurisprudence Must Be Clarified to Require a Factual Record as a Predicate to the Determination of a Qualified Immunity Defense Against a Claim Under the Fourth or Fifth Amendment.**

With respect to Mr. Bella's Fifth Amendment claim of excessive force, the Tenth Circuit, based solely on the facts asserted in the complaint, engaged in weighing of those factual assertions of abuse against its own constructed justifications for the use of that force, to conclude that "the potentially deadly force" used in this case was not "grossly disproportionate to the need presented." Appendix at 14a-15a, n.9, *infra*. The Tenth Circuit did so in the face of petitioner's contention that the egregiousness of respondents' actions could not be decided without further factual development and a more extensive record, because it felt precluded by this Court's qualified immunity jurisprudence from allowing any discovery on the matter. Appendix at 15a, n.10, *infra*.[8]

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[8] Under settled Rule 12(b)(6) jurisprudence, to determine whether a plaintiff has stated a claim, the court is to consider not whether the plaintiff will ultimately prevail but whether the plaintiff is entitled to offer evidence to prove his claim. *Scheuer v. Rhodes*, 416 U.S. 232 (1974). The Tenth Circuit here did exactly what is prescribed in *Scheuer* and decided the case on the merits based solely upon the facts alleged in the pleadings. The court made its own factual findings and drew the ultimate factual conclusion that the governmental conduct was not egregious.

Indeed, the Tenth Circuit inferred that there was a risk of escape. In so doing, the court ignored the petitioner's allegations concern-

The problem began with this Court's decision in *Mitchell v. Forsyth*, 472 U.S. 511 (1985), holding that qualified immunity is an immunity from suit not a mere defense to liability. Recognizing the immense pre-trial task this would impose upon the courts if *Mitchell* required a resolution of factual issues on the merits, some courts refused to conduct a fact-based analysis on the merits. *See, Bonitz v. Fair*, 804 F.2d 164 (1st Cir. 1986). When this Court then held in *Anderson v. Creighton*, 483 U.S. 635 (1987) that the trial court must conduct a fact-based inquiry, the First Circuit overruled *Bonitz* and held that a fact-based analysis was required by qualified immunity jurisprudence. *Unwin v. Campbell*, 863 F.2d 124 (1st Cir. 1988). However, this analysis generally continued to focus only upon whether the plaintiff was asserting a right which was clearly established of which the defendant knew or should have known, within the meaning of *Mitchell*. This Court then established, in *Siegert v. Gilley*, 111 S.Ct. 1789 (1991), that the first question to be resolved in a qualified immunity motion is whether the plaintiff had stated a claim at all.

The result of these rulings is that many lower courts, like the Tenth Circuit in the instant case, have been making ultimate factual determinations without the benefit of any evidentiary development of those facts.[9] *See,*

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ing visual and radar contact throughout the chase and the size of the government helicopter giving chase, which supported petitioner's inference that escape was impossible. *See* Appendix at 14a, n.9, *infra*. Furthermore, the Tenth Circuit not only made its own factual findings unsupported by any record, but also refused to accept petitioner's allegations as true. *See id.* at 11a, n.8, *infra*.

[9] This has created an horrendous "Catch 22" for plaintiffs in that they are required to prove their case before discovery and based solely on the pleadings. In those instances where trial judges deny those motions, plaintiffs must then defend those denials on interlocutory appeals without the benefit of any factual development whatsoever. *See Mitchell v. Forsyth*, 472 U.S. 511 (1985).

The difficulty with this approach was aptly described by the Seventh Circuit in *Elliot v. Thomas*, 937 F.2d 338, 341 (7th Cir.

*e.g., Jackson v. City of Beaumont Police Department,* 958 F.2d 616 (5th Cir. 1992) (complaint must include facts sufficient to allow court to determine whether force used was reasonable); *Hunter v. District of Columbia,* 943 F.2d 69 (D.C.Cir. 1991) (complaint must contain facts sufficient to demonstrate that force used was "actually excessive"); *Sawyer v. County of Creek,* 908 F.2d 663 (10th Cir. 1990) (no deliberate indifference found where court required that complaint must include all factual allegations necessary to sustain conclusion that defendant violated clearly established law); *Brown v. Glossip,* 878 F.2d 871 (5th Cir. 1989) (complaint must allege facts sufficient for court to determine reasonableness).

A number of circuits, however, have held that whether or not the use of force was excessive in the circumstances is an issue for the factfinder and have refused to decide the issue on the pleadings or in some cases on summary judgment. *Alexander v. City and County of San Francisco,* —— F.3d ——, 1994 WL 321757 (9th Cir. 1994) (summary judgment inappropriate because reasonableness of force is a matter for the jury); *McDonald v. Haskins,* 966 F.2d 292 (7th Cir. 1992) (whether force used was excessive could not be decided without additional fact development of a summary judgment procedure); *Quezada v. County of Bernalillo,* 944 F.2d 710 (10th Cir. 1991) (factfinder decides if force used is objectively unreasonable; qualified immunity therefore of limited utility in excessive force case); *Brower v. County of Inyo,* 884 F.2d

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1991), *cert. denied,* 112 S. Ct. 1242 (1992). *Elliot* recognized that by "sleight of hand you can turn any defense on the merits into a defense of qualified immunity." *Id.* Since the denial of the claim of immunity entitles the defendant to an immediate appeal, the process grants every public defendant a pretrial appellate decision on the merits. *See id.* at 341-42. The court noted that this is a far cry from the position of *Harlow, Mitchell,* and *Anderson* that describe qualified immunity as a defense contingent on the state of the law. *Id.* at 341; *see also, Stevens v. Corbell,* 832 F.2d 884 (5th Cir. 1987) (recognizing that qualified immunity is of limited utility in due process excessive force cases).

1316 (9th Cir. 1989) (whether force used was excessive could not be determined on the pleadings; whether non-deadly alternatives existed was a question of fact); *Medeiros v. Town of South Kingstown,* 821 F. Supp. 823 (D.R.I. 1993) (excessiveness of force could not be decided in context of motion to dismiss); *Thompson v. Spikes,* 663 F. Supp. 627 (S.D.Ga. 1987) (deciding reasonableness of force used would be more in nature of judgment on the merits than true determination of qualified immunity and was question for jury).

This conflict cries out for resolution. Clarification is necessary to eliminate the quality of unreality and gross unfairness which it brings to excessive force cases involving claims of qualified immunity. Qualified immunity as applied to excessive force cases where the legal standards turn on quintessential jury questions is unworkable without clarification. Petitioner, therefore, asks this Court to grant the writ and clarify its qualified immunity jurisprudence in excessive force cases to require a factual record as a predicate to the determination of a qualified immunity defense against a claim under the Fourth or Fifth Amendment.[10]

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[10] Indeed, this Court has implicitly recognized the importance of the question presented here, when it granted the writ in *Siegert* on the related question of whether a complaint alleging malice as an essential element of a cause of action may be dismissed on the grounds of qualified immunity prior to limited discovery. 111 S. Ct. at 1796 (Marshall, J., dissenting). Although this Court's final resolution of *Siegert* did not require an answer to that question, the grant of the writ in that case at least recognized the importance of the question.

## CONCLUSION

For the foregoing reasons, petitioner respectfully requests that this Court grant the petition for writ of certiorari and set this matter for plenary consideration.

Respectfully submitted,

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